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Supreme Court, U.S.
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No. _____

IN THE

Supreme Court of the United States

October Term, 1997

DAWN F. MUNDAY - PETITIONER,

v.

WASTE MANAGEMENT OF NORTH AMERICA, INCORPORATED, ET AL., - RESPONDENTS

On Petition For A Writ of Certiorari To The United States Court Of Appeals For The Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

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40 pp

QUESTIONS PRESENTED

Waste Management of North America, Incorporated, et al., filed its notice of appeal from the United States District Court for the District of Maryland after the court entered its decision, and Dawn Munday filed her counter-appeal thereafter. The Fourth Circuit Court of Appeals overturned the District Court's decision in part, remanded the case to the District Court in part and ruled that the Counter appeal was moot. The questions presented here are:

I. Didn't the Fourth Circuit Panel of Judges below err by interpreting 42 U.S.C. 2000 e3(a) to permit forms of retaliation, including a management-led campaign to drive an individual from the work place, that did not meet the panel's

definition of "adverse employment actions"?

II. Didn't the Fourth Circuit Panel of Judges below err by substituting its Judgment for that of the Trial Court about the existence of constructive discharge and more specifically the intolerability of the working conditions, particularly where the Appellate Court did not have the transcript of testimony from the Trial Court?

III. Didn't the Fourth Circuit Panel of Judges below err by failing to decide the issue of whether or not compensatory and punitive damages should be apportioned for acts prior to and after November 21, 1991 (the date on which Title VII was changed to allow compensatory and punitive damages) and by

remanding this case to the District Court for a further trial on the breach of contract damages, in light of the facts that the original decision of the Trial Court made a clear finding as to the breach of contract damages and the apportionment issue?

LIST OF PARTIES

All parties do not appear in the caption of the case on the cover page.

A list of all parties to the proceeding in the Court whose judgment is the subject of this petition is as follows:

1) Petitioner - Dawn Munday

2) Respondents- Waste Management of North America, Inc.

Waste Management of Maryland, Inc.

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OPINIONS BELOW

The opinion of the District Court of the United States for the District of Maryland, dated August 4, 1994, is attached hereto the Appendix B. It is published at 858 F.Supp.1364 (D.Md.1944). The opinion of the United States Court of Appeals for the Fourth Circuit, dated September 11, 1997, is published at 126 F.3d 239 (4th Cir. 1977) and reprinted here as Appendix A. By order filed on October 7, 1997, the Fourth Circuit denied your Petitioner's Motion For Rehearing And Suggestion For Rehearing En Banc. A copy of that decision is Appendix C.

JURISDICTION

This case involves claims for money

damages due to violation of Title VII (and state and local laws) and breach of contract. It was tried before the U.S. District Court for the District of Maryland. An appeal and counter-appeal were timely filed.

The Fourth Circuit overruled the District Court decision in part, affirmed it in part, remanded it to the District Court and held that the apportionment issue was moot. On October 7, 1997 the Fourth Circuit denied Munday's timely-filed Motion For Rehearing And Suggestion For Rehearing En Banc. Pursuant to Supreme Court Rule 13.1, this petition has been filed within 90 days of the denial of rehearing.

This Honorable Court has jurisdiction over this case pursuant to

28 U.S.C. 1254 and the Trial Court had jurisdiction pursuant to 28 U.S.C. § 1331 and 42 U.S.C. 2000e(2) and (3).

STATUTES AND RULES INVOLVED IN THIS CASE

42 U.S.C. 2000e2(a)
42 U.S.C. 2000e3(a)
42 U.S.C. 2000e7
F.R. App. P.10(b)(2)

These statutes and rules are set forth in Appendix D.

STATEMENT OF THE CASE

The District Court found intentional retaliation and constructive discharge in violation of statute (specifying Title VII as opposed to State or local law) and in breach of a settlement agreement between the parties and found that the Plaintiff suffered damages of $167,183.47. These damages were apportioned to $77,183.47 because the

Trial Court ruled that punitive and compensatory damages could not be awarded for acts which occurred prior to November 21, 1991. Waste Management appealed the trial court's decision and Munday filed a counter-appeal on the apportionment issue.

The Fourth Circuit reversed the finding of a Title VII violation and constructive discharge finding, affirmed the finding of retaliation in breach of the settlement contract, found the apportionment issue moot and remanded the case for further proceedings on the issue of damages under the breach of contract count.

REASONS FOR GRANTING THE WRIT

I. THE PANEL'S HOLDING THAT TITLE

VII PERMITS EMPLOYER RETALIATION UNLESS IT MEETS THE PANEL'S DEFINITION OF AN ADVERSE EMPLOYMENT ACTION HAS NO BASIS IN THE LANGUAGE OF 42 U.S.C. 2000e3(a), UNDERMINES ENFORCEMENT OF TITLE VII, AND CONFLICTS WITH CASE LAW IN THIS AND OTHER CIRCUITS.

42 U.S.C. 2000e3(a) (known as § 704(a) of Title VII) broadly prohibits employers from discriminating against an employee for engaging in protected activity (ie retaliation). The provision is not limited to retaliation or discrimination that takes the form of an "adverse employment action" or to actions that affect the terms and conditions of a person's employment. Rather, the plain terms of this provision prohibit employers from taking any kind of action against an employee who participates in

proceedings under Title VII.

However, according to the majority of the Panel below, § 704(a) does not prohibit an employer from subjecting an employee to a retaliatory campaign of shunning and spying designed to cause the employee to resign -- even where, as here, the campaign concededly caused the employee compensable emotional distress and succeeded in pressuring her to resign. The majority's holding that § 704(a) permits some forms of retaliation cannot be reconciled with the language of the provision, which prohibits all retaliation, without exceptions. It is antithetical to the purpose of the anti-retaliation provision and inconsistent with decisions by this Court and other Courts of Appeals. See, e.g., McKenzie

v. Illinois Dept't of Transportation, 92 F.3d 473, 485 (7th Cir. 1996) noting that "under the proper circumstances, an employer who orders other employees not to talk to a Title VII claimant could indeed retaliate against that claimant by, in effect, ordering others to shun her".

The starting point for interpreting a statute is the language of the statute itself. Kaiser Alum. & Chem. Corp. v. Bonjorno, 494 U.S. 827, 835 (1990). Section 704(a) makes it unlawful for "an employer to discriminate against any of his employees or applicants for employment...because he has made a charge" under Title VII. This language broadly prohibits any discrimination against an employee for filing a charge.

It "speaks unconditionally, without limitation to acts causing particular harms such as the loss of a particular job or promotion." Smith v. Secretary of the Navy, 659 F.2d 1113, 1119 n. 56 (D.C. Cir. 1981); McDonnell v. Cisneros, 84 F.3d 256, 258 (7th Cir. 1996) (Posner, C.J.) ("No limiting language appears in Title VII's retaliation provision."); c.f. Passer v. American Chem. Soc'y, 935 F.2d 322, 331 (D.C.Cir. 1991) (holding that the same language in § 4(d) of the ADEA "does not limit its breach only to acts of retaliation that take the form of cognizable employment actions, such as discharge, transfer, or demotion.".

It is striking that the panel majority limited the prohibition on retaliation in § 704(a) by using terms

that Congress used in 42 U.S.C. 2000e2(a) (Section 703) but chose not to use in § 704(a). In prohibiting discrimination on the basis of race, color, religion, sex or national origin in §703 (a), Congress prohibited employers from "discriminat[ing] against any individual with respect to his compensation, terms conditions, or privileges of employment." 42 U.S.C. § 2000e-2(a) (emphasis added).

In contrast, the language of § 704(a), as noted above, contains no such limitation. By writing § 703 (a) as it did, Congress demonstrated that it knew how to draft a prohibition on discrimination that is limited to specific employment practices. If it had wanted the prohibition on discrimination (retaliation) for filing a charge in §

704(a) to be similarly limited, it would have been a simple matter for congress to use the same language it used in § 703(a) to accomplish that end. Instead, Congress chose to use broader language. The logical inference is that Congress in § 704(a) intended to prohibit not merely discrimination with respect to terms and conditions of employment, but discrimination of any kind.

If the decision of the Fourth Circuit in this case is allowed to stand, employees within the jurisdiction of the Fourth Circuit (and perhaps beyond) will lose an important part of their protection against retaliation. The EEOC's ability to enforce Title VII will also be compromised, since some employees who would otherwise file charges of

discrimination will undoubtedly keep silent once they become aware that they have no statutory protection against the sort of retaliation endured by the plaintiff in this case.

Your Petitioner therefore urges this Honorable Court to grant the Petition for Writ of Certiorari and make clear that § 704(a) prohibits any kind of retaliatory conduct that would deter a reasonable person from enforcing their rights under Title VII. This would also resolve the differences in regard to the interpretation of §704(a) amongst the various circuits and protect the rights of all employees.

II. THE PANELS HOLDING ABOUT INTOLERABILITY OF CONDITIONS CAN ONLY BE FAIRLY MADE ON A REVIEW OF THE ENTIRE RECORD AND F.R. APP. P. 10 (b)(2) REQUIRES

THE APPELLANT TO PROVIDE ALL OF THE RELEVANT RECORD TO SUPPORT ITS APPEAL. THE FAILURE TO PROVIDE THE RECORD SHOULD BAR SUCH AN APPEAL AND THERE SHOULD BE CASE LAW THAT MAKES THIS CLEAR.

Even if adverse employment action is required under § 704(a) there was constructive discharge found by the Trial Court and constructive discharge is an adverse employment action itself. See Evans v. Davie Truckers, Inc., 769 F.2d 1012, 1014 (4th Cir. 1985). Contrary to the decision of the Fourth Circuit, the only two elements of constructive discharge are: 1) deliberateness of the employers action (which was found below and not questioned by the Fourth Circuit Panel) and 2) that the working conditions become so intolerable that a reasonable

person would quit. Bristow v. Daily Press, Inc., 770 F.2d 1251, 1255 (4th Cir. 1985).

The Lower Court correctly cited the law as to constructive discharge at page 23 of its decision and made a factual determination, that the conduct over a number of years caused the Petitioner psychological and physical harm and created an intolerable working condition. The Fourth Circuit inappropriately overruled these factual findings, implying that there had to be a separate adverse employment action to support a constructive discharge finding. If that decision is allowed to stand, it will deny employees within the Fourth Circuit (and perhaps beyond) their full rights.

Further, the Fourth Circuit has

previously stated that constructive discharge is a question of fact which is reviewed under the clearly erroneous standard. Bristow, 770 F.2d at 1255. And see Evans v. Davie Truckers, Inc., 769 F.2d 1012, 1014 (4th Cir. 1985) which applied the clearly erroneous standard to review of a decision on constructive discharge. Intolerability is an element of constructive discharge. In this case the Fourth Circuit incorrectly stated that the clearly erroneous test did not apply. This confusion needs to be clarified by this Honorable Court. Also, this Honorable Court has indicated that the clearly erroneous standard plainly does not entitle a reviewing court to reverse the finding of the trier of fact simply because it is convinced that it

would have decided the case differently. Anderson v. City of Bessemer City, N.D., 470 U.S. 564, 573 (1985). The Fourth Circuit incorrectly did just this.

It is unreasonable for the Fourth Circuit to determine that the evidence did not support a finding of intolerability unless the appellate court had looked at the entire record. Since the Fourth Circuit Panel did not have the entire record, it should not have substituted its judgment for that of the trier of fact.

When an Appellant intends to challenge a factual finding or conclusion, F.R. App. P. 10 (b) (2) requires the Appellant to include in the record a transcript of all evidence relevant to such finding or conclusions.

This obligation also arises when the Appellate Court is asked to review issues of fact mixed with issues of law. Southwest Administrators, Inc. v. Lopez 781 F. 2d 1378, 1380 (9th Cir.1986). Failure to file a required transcript raises an effective barrier to informed, substantive appellate review. McGinnis v. Gustafson, 978 F.2d 1199, 1201 (10th Cir. 1992). In such circumstances, the appellate court has no alternative but to affirm the affected ruling, Deines v. Vermeer Mfg. Co., 969 F.2d 977 979 (10th Cir. 1992) (citing numerous cases), refuse to consider the appeal, Powell v. Estelle, 959 F.2d 22, 26 (5th Cir. 1992) or dismiss the appeal outright. Syncom Capital Corp. v. Wade, 924 F.2d 167, 169 (9th Cir. 1991). Therefore, the failure

to provide the transcript in this case should have been a bar to the appellate review the Appellant requested. This is particularly true in the present case, since the Trial Court's decision in regard to constructive discharge, at page 23 states that the Trial Court relied on "all" of the evidence (rather than just those facts set forth in its decision).

It is also important to note that the dissent found that even on the limited record before this Honorable Court, there was sufficient evidence of intolerability. If there is room for disagreement between the Appellate Judges, based only on the facts set forth in the Trial Court's decision, clearly the Trial Court's decision should not be set aside without a review of all of the

evidence. This is an important principle in regard to Appellate review which should be clearly stated for all Appellate Courts and for all future Appellants and Appellee.

III. THE APPORTIONMENT ISSUE SHOULD HAVE BEEN HEARD BELOW BECAUSE IT WAS RELEVANT TO THE DAMAGE FINDINGS BY THE TRIAL COURT IN REGARD TO BOTH THE TITLE VII AND BREACH OF CONTRACT COUNTS AND IS AN ISSUE THAT HAS NOT YET BEEN DECIDED BY AN APPELLATE COURT IN REGARD TO THE STATUTE AT ISSUE IN THIS CASE. FURTHER, A PLAINTIFF THAT SUCCESSFULLY LITIGATES AN ISSUE TO A JUDGMENT FOR A SUM OF MONEY SHOULD NOT BE PUT TO THE EXPENSE OF ANOTHER TRIAL ON DAMAGES WHEN THE ORIGINAL DECISION CLEARLY SETS FORTH THE FINDINGS AS TO DAMAGES.

The Trial Court held that only 40% of punitive and psychological damages were due to the Plaintiff (for those actions which occurred after November 21,

1991 - $20,000.00 of psychological at A31 and $40,000.00 of punitives at A32). This was based on a change in Title VII which was effective on November 21, 1991. The Trial Court held that the damages under the breach of contract count should be limited to the apportioned amounts under Title VII (plus the back pay). The Trial Court also held that under Maryland law on breach of contract, the damages would not have to be apportioned (A34).

A district court is required to follow the choice of law rules of the forum where it sits. Friendship Heights Associates v. Koubek, 573 F.Supp. 100, 102 (D.Md. 1983). The court in Friendship Heights also recognized that Maryland applies the law of the place where the contract was made. The

Settlement Agreement was entered into in Maryland and thus should be governed by Maryland law.

The Fourth Circuit recognized in Fairfax Countywide Citizens v. Fairfax County, 571 F.2d 1299, 1303 (4th Cir. 1978) that a settlement agreement terminating civil rights litigation was a private contract, the validity and the interpretation of which was governed by state law. The only restrictions upon a court's authority to require the parties to fulfill a settlement agreement are those contained in the contract itself and the principles of contract law, provided enforcement of the agreement does not conflict with the purposes of Title VII. EEOC v. Safeway Stores, 714 F.2d 567 (5th Cir. 1983). The use of

federal common law (as applied in the Trial Court's decision) should be limited to situations where a significant conflict exists between some federal policy or interest and the use of state law. O'Melveny & Myers v. FDIC, 512 U.S. 79 (1994). There is no conflict in allowing greater damages under Maryland breach of contract law (than would be allowed under Title VII) because Title VII, 42 U.S.C. §2000e-7 very specifically states:

> Nothing in this subchapter shall be deemed to exempt or relieve any person from any liability, duty, penalty or punishment provided by any present or future law of any state or political subdivision of a state...

Section 2000e-7 explicitly provides for state law that allows an employer to

be liable for damages other than (and, therefore, greater than) those allowed under Title VII.

In Bernstein v. Aetna Life & Casualty, 843 F.2d 359 (9th Cir. 1988) the court recognized the state interest in having its laws upheld and saw no significant conflict with Title VII merely because the state common law allowed greater remedies than those available under Title VII. The conflict between Bernstein and other decisions and the Fourth Circuit decision in this case needs to be resolved.

Further, Title VII is a remedial statute, the purpose of which is to protect employees; accordingly, the statute should be construed liberally to that effect. Tcherepnin v. Knight, 389

U.S. 332, 336, (1967). Reading §2000e-7 in a liberal manner indicates that State law can provide additional protection to employees without hampering the purpose of Title VII.

Even if this Honorable Court should find that damages from a breach of a Title VII settlement agreement are controlled by Title VII, Title VII does not require apportionment of the damages. Landgraf v. USI Film Products, 511 U.S. 244 (1994) held that Title VII should not be applied retroactively, but also discussed when application of a new statute to past conduct is not retroactive. Plaintiff respectfully contends that pursuant to Landgraf, the application of the November 21, 1991 amendment of Title VII to the entire

course of Waste Management's conduct is not retroactive. The Supreme Court specifically stated in Landgraf that a statute does not necessarily operate retroactively merely because it is applied to conduct antedating the statute's enactment. Landgraf, 114 S.Ct. at 1499. A court must ask whether the new provision of the statute "attaches new legal consequences to events completed before its enactment." Id. (emphasis supplied). The word "completed" signifies that applying the Amendment to an entire course of conduct is not a retroactive application of the statute, provided the conduct is continuous and ongoing (i.e., from before the date of enactment until after the date of enactment).

In Reynolds v. United States, 292 U.S. 443 (1934), this Honorable Court considered a change in the law prohibiting a government hospital from offsetting the costs of the plaintiff's room and board from his accrued veteran's benefits. This change in the law occurred in the middle of a hospital stay that began before the enactment of the statutory provision and was completed after the enactment. The Supreme Court held that it was not a retroactive application of the new statute to apply it to the entire hospital stay. Reynolds, 292 U.S. at 448-449.

The general presumption against applying statutes retroactively is based on fair notice concerns for the party now affected by the new statute. For a

wrongdoer to claim unfairness in the application of ostensibly new sanctions to an entire course of illegal conduct when the course of conduct is continued after the new sanctions become law, however, stretches the concept of fairness past the breaking point, as the wrongdoer easily could have chosen to discontinue the course of conduct once the new sanctions became effective. In essence, there was a single ongoing wrong (ie the retaliatory course of conduct) committed against Plaintiff, which began before the effective date of the Amendment, but which continued and was not <u>completed</u> until after the Amendment became law. It is not retroactive to apply the amendment of the law to the entire period of wrongdoing and therefore

the damage finding need not be apportioned, even under a Title VII analysis.

Further, the calculation of damages is a finding of fact. U.S. v. St. Paul Fire and Marine Insurance Company, 86 F.3d 332 (4th Cir. 1996). The extent of damages is also a finding of fact. Kahle v. McDonough Builders, Inc., 582 A.2d 557 (Md. 1990). Since the Appellate Court has ruled that the facts, as already determined by the Trial Court, are undisputed, the factual findings as to the existence and amounts of damage are fixed by the Trial Court's decision in this case.

A decision on the apportionment issue (which is an unanswered question to date) could be applied to the Trial

Court's decision so that a remand and possible further appeals will not be necessary. A remand, with its accompanying expenditure of additional judicial resources, in a case thought to be completed, should be limited to cases where further action must be taken by the District Court. See Consolidated Aluminum Corporation v. Foseco International Limited, 910 F. 2d 804 at 814 (Fed. Cir. 1990).

This Honorable Court should address the as yet undecided and significant apportionment issue, avoid unnecessary further proceedings in this case and other Title VII cases and possible further appeals from those unnecessary proceedings. This Honorable Court should also make clear that remanding for

further proceedings should only be done when absolutely necessary.

CONCLUSION

For all or any of the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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